No. 4946

in the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit.

KETCHIKAN LUMBER AND SHINGLE COMPANY,
a corporation,
Plaintiff in Error,

vs.

A. WALKER,
Defendant in Error.

PETITION FOR REHEARING

GEORGE B. GRIGSBY
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Comes now the Defendant in Error, A. Walker, and respectfully moves the court for a rehearing herein, and in that connection represnts as follows:

This cas was submitted on briefs, without argument. We believe that a reconsideration of the case after argument will induce this court to reverse its decision and affirm the judgment of the lower court.

But if the court adhers to its opinion, then it seems to us that the judgment of the lower court should be modified.

Addressing ourselves to the latter proposition we quote from the opinion of the court as follows:

> "Careful examination of the record in this case discloses nothing which justifies the use of other than the rule of schedule compensation for the loss of a hand as a measure of recovery. Plaintiff in error was entitled to have the jury so advised, and it was error to refuse its request in that behalf."

If the court was right in the above conclusion the limit of recovery in this case was $3120.00. As stated in the opinion of the court,

> "The second physician gave it as his opinion that there was between 5 and 10 per cent of the functioning power of the hand left, but that the claimant was less able to work than he would be without a hand, and that he would have better use of the arm if the hand was amputated and an artificial hand substituted."

The jury having made a specific finding that the injury to plaintiff's hand diminished his earning capacity more than if the hand had been completely severed, and having found that he suffered a loss of earning capacity of 65%, the conclusion is inescapable that if the court had given the instruction quoted in the opinion, and on the failure to give which error is assigned, the judgment in this case would have been $3120.00.

Consequently if we are unable to induce this court to reverse its opinion, we think the judg-

ment should be modified and reduced to $3120.00.

The plaintiff should not be compelled to go through the expense of another trial and suffer the delays incident thereto, when it is perfectly clear what the verdict would have been had the lower court given the omitted instruction.

THE JUDGMENT SHOULD BE AFFIRMED

We earnestly believe that the court is in error in its statement that the rule of schedule compensation for the loss of a hand is the measure of recovery in this case. If the court is right in stating that the limit of recovery is the amount recoverable for the loss of a hand, still the measure of damages would be the loss of earning capacity, which applied to this case would be 65% of $7800.00, or $5070.00.

If the court believes this amount inconsistent with the legislative intent as expressed by the value or price fixed for the loss of a hand, then the remedy would be to scale the judgment to the statutory limit for loss of a hand, or $3120.00, not to depart from the measure of damages prescribed by the law.

Suppose that in this case the plaintiff proved a 25% loss of earning capacity. According to the statute he would be entitled to 25% of $7800.00, or $1960.00.

Would the court in such a case say that the wrong rule as to measure of damages was fol-

lowed? We think not. To do so would make all evidence of loss of earning capacity irrelevant. The plaintiff would be confined to proof of percentage of anatomical loss of the hand. But the statute says that the measure is loss of earning capacity. Does the court mean that statute is not applicable to any case involving an injury to a member?

The Act says that in all cases not wholly within the provisions of the schedule providing for compensation for loss of members, the measure of damages shall be loss of earning capacity. Would this court hold that if a man sustained injuries to each of his hands and feet, he would not be allowed to prove his loss of earning capacity, but would be under the necessity of proving the percentage of anatomical loss or injury to each member?

It is one thing to say that the damage occasioned by an injury to an arm shall not be in excess of that prescribed by schedule for the loss of the arm, and another to say that the damage in the former case shall not be computed, as directed by the statute, by loss of earning capacity. Such a rule would upset what has been the universal practice in such cases.

So we say that if the judgment in this case must be set aside because inconsistent with the schedule compensation for the loss of a hand, it should be modified and reduced to the point

where the inconsistency begins.

But we contend that as a matter of law the measure of damages in this case is the loss of earning capacity, and that the only limit of recovery is the statutory limit of $6240.00. To discuss this proposition fairly it must be assumed without question that the plaintiff proved a 65% loss of earning capacity. Following the specific directions of the statute he would be entitled to 65% of $7800.00, that being the amount he would be allowed for total disability. But the court says this would result in a judgment in excess of the amount allowed for loss of a hand, that such a judgment would be inconsistent. The court says that this employe is bound by the schedule, that he could have rejected the benefits of the Act. But we say that the employer is also bound by the schedule. He contracted to pay for loss of earning capacity in case of injuries not wholly within the schedule. The court says that to pay more for an injury to a hand than for its loss is to say the part is greater than the whole. But to say the case of an injury to an arm or hand is wholly within a schedule fixing an arbitrary price on the loss of an arm or hand is to say that a part is equal to the whole. The maxim is not applicable. The court overlooks the plain purpose of the statute, which was to provide as speedy and fair and certain a way as possible to pay employees for injuries arising out of their employment. As far as possible the legislature

made the compensation fixed and certain, in order to bring about prompt settlements and avoid litigation and delay. Hence an arbitrary amount is fixed for the loss of different members of the body. Having made certain all that could be made certain, the legislature was confronted with the problem of fixing a compensation for injuries not in the schedule, and said:

> WHENEVER SUCH EMPLOYE RECEIVES AN INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT, AS A RESULT OF WHICH HE IS PARTIALLY DISABLED, AND THE DISABILITY SO RECEIVED IS SUCH AS TO BE PERMANENT IN CHARACTER AND SUCH AS NOT TO COME WHOLLY WITHIN ANY OF THE SPECIFIC CASES FOR WHICH PROVISION IS HEREIN MADE,

he shall be entitled to compensation according to loss of earning capacity.

Plaintiff's injury does not come wholly within the schedule. To say it does is to misapply the maxim, "the greater includes the less." To say that it does come wholly within the schedule is to say that the plaintiff must prove the percentage of loss of his hand, anatomically. That such a rule must be applied to all cases involving injury to members. The proof would be limited to the testimony of physicians and surgeons, to their estimate of percentage of loss.

The object of the Act is certainty, as far as possible. It was possible to attain absolute certainty

as to actual loss of members. As to other injuries the legislature decided that the nearest approach to certainty was to adopt the measure of loss of earning capacity. Of course that measure is not absolutely certain. But we believe it more certain than the anatomic measure. At any rate it is the measure adopted. If the plaintiff had injured his back he would have to prove loss of earning capacity. And the measure would be no more certain than if he injured his hand or arm or foot. If he proved 65% loss of earning capacity from an injury to his back, he would recover according to the statute. But if he proved the same loss of earning capacity from an injury to his hand, this court says he cannot recover according to the statute, because the result would be out of proportion to the schedule. It would be inconsistent. Yes, it is somewhat inconsistent. But is it not more inconsistent to say that a man should receive more for a 65% loss of earning capacity caused by an injury to his back than from a 65% loss of earning capacity caused by an injury to his hand?

A man might suffer 50% loss of earning capacity from an amputation to a hand, or he might suffer more or less than 50% loss of earning capacity from such amputation, but in any case he gets $3120.00. Why? Because he and his employer agreed to this price. But they also agreed that in all cases not wholly within the

schedule the injury should be paid for according to loss of earning capacity, with no limit of recovery except $6240.00.

The legislature provided but two ways of measuring damages in compensation cases, one according to a fixed schedule, the other according to loss of earning capacity. It seems to us that this court in its opinion seeks to provide a third way. One of the two ways provided by the legislature is by a fixed schedule, in which the compensation is absolutely certain. The other way is my loss of earning capacity which is not absolutely certain, but the nearest approach to certainty that the legislature could devise. This court attempts to measure the damage caused by an injury, which is not wholly nor exactly within the fixed schedule, according to such schedule, a method less certain than that provided by statute. That is the way we must construe the court's opinion because it reads:

> "Careful examination of the record in this case discloses nothing which justifies other than the rule of schedule compensation for the loss of a hand as the measures of recovery."

The court does not say as the limit of recovery, but the measure of recovery. It would be impossible to approach certainty by such a measure. It is contrary to the express provision of the Act.

In determining loss of earning capacity, where that is the measure, the courts take into consid-

eration the nature of the employment, the capabilities and limitations of the person injured, his ability or lack of ability to work at his regular occupation and to get other kinds of work. None of these considerations affect the case of one who actually loses a member. There the compensation is arbitrarily fixed. But it cannot be arbitrarily fixed where where he injures a member; it depends upon proof in such a case, and the legislature has prescribed to what the proof shall be directed, viz, loss of earning capacity. The Act does not say this rule shall apply only to injuries other than injuries to members. It does not mean that for an injury to a back the measure shall be loss of earning capacity while for an injury to a leg, an arm, foot or hand the measure shall be the percentage of loss of the leg, arm, foot or hand.

We concede that it appears to be inconsistent that a man can recover more for an injury to a hand than for the loss of the same hand. The Act created this inconsistency. But to say that a man can recover $5070.00 for a 65% loss of earning capacity resulting from an injury to his back, yet the same man for an injury to his leg, arm, foot or hand, although he proves the same loss of earning capacity, cannot recover the same damage is not only inconsistentent but nearly absurd, and is without legislative sanction. It seems to use that the court, to avoid the incon-

sistency inherent in the Act, has created another and more glaring inconsistency.

It is not contended by the court, that in case the plaintiff, who has depended all his life on manual labor for the support of his wife and children, for whom manual labor has become impossible, has recovered judgment so excessive as to be unreasonable, but that it is so excessive as to be inconsistent with the contract price of a different class of injury.

But should the court scale down this judgment because of such an inconsistency?

The Act fixes the sum $6240.00 as the limit of recovery for partial permanent disability. Should the court fix another limit where the disability results from an injury to a hand, and necessarily in all other cases involving injury to members?

Where the legislature says,

In all cases involving permanent partial disability the injured employe shall be paid according to loss of earning capacity, but not to exceed the sum of $6240.00, will this court add

But in case of injury to a hand not exceed $3120.00

But in case of injury to a foot not to exceed $3120.00

But in case of injury to an arm not to exceed $3900.00

But in case of injury to a leg not to exceed $3900.00

and if so would this not be legislation, resulting in the following rule:

> The injured employe shall not be paid according to loss of earning capacity, but according to how he lost his earning capacity,

and the question would be,

> Not, how much earning capacity did he lose, but how did he lose it?

SUFFICIENT EVIDENCE TO SUSTAIN JUDGMENT.

We contend that there was sufficient evidence of additional injury to the person of plaintiff, aside from the almost total destruction of his hand, to sustain the verdict.

In its opinion the court says:

> "While the claimant testified that he suffered from nervousness there was no evideenc of a substantial kind to warrant the conlusion that there had been any unusual shock to the nervous system, one not ordinraliy connected with an injury that would necessitate the amputation of the member. Neither physician found any evidence of any unusual resulting condition impairing the health or physical ability of the man, and none of the evidence set forth in the record exhibits such a case."

And further on the court says:

> "The claimant in this case was at all times able to work after his hand injury healed, so far as the record shows."

We submit that the evidence does not support the above statements. We submit that the evi-

dence in this case shows injurious results which do not ordinarily result from amputation.

The plaintiff testified that he was in good health prior to the injury, that he worked all the time. That since the injury he had been unable to perform any manual labor. That his nerves were not as good as formerly, that they bother him, that he cannot rest as well, that his arm pains him part of the time, that his hand pains him all the time; he testified,

> Q. To what extent at the present time are you able to perform manual labor?
> A. None at all.

That he tried to get work and could have gotten two jobs, but was not able to do the work, that finally a year after the accident he got a job as night watchman, but did not knaw how long it would last. That he is weaker physically. He testified,

> "I tried to get a job all over town and I haven't been able to get any job only that one(referring to the job as night watchman) that I could handle. I was offered two different jobs but after they found out my condition they wouldn't take me."

That prior to the injury he was able to get work all the time.

Is it fair to say as the court says?

> "The claimant in this case was at all times able to work after the hand injured healed, so far as the record shows."

One of the co-employes testified that the phys-

ical condition of the plaintiff was not to be compared to his present physical condition. That he was not the same man he was before.

It will not be contended that this witness meant that plaintiff was simply a one handed man.

We respectfully submit that these results existing a year afterward, do not ordinarily follow from an amputation. That the system is not ordinarily weakened, that constant pain does not ordinarily follow, that sleeplessness and nervousness are not usual results. And the court should bear in mind that this evidence is uncontradicted. The doctors all admitted that impairment of the nerves might exist without objective indications, that without special tests they could not tell. That the patient might describe his symptoms and they might readily believe him.

See testimony Carrothers pages 43-44-45 T. R.
Also Ellis pages 55-56-57 T. R.

The evidence of the plaintiff as to his general health, ruggedness, nerve impairment, physical weakness, is not only undenied, it is the only evidence in the case. The jury saw the plaintiff. They believed his testimony. It was substantial evidence of additional injury to the system of the plaintiff, which would lessen his earning capacity and which was by no means unbelievable or extraordinary. If it had been, expert testimony could have disproved it. In addition to this evidence is the positive testimony of one of the

physicians that the condition of the hand itself rendered the plaintiff less capable of earning a living than if it had been completely severed.

We do not believe that the fact that at the time of the trial plaintiff was employed as a night watchman at $100.00 per month could have affected the court's decision. For more than a year he had been unable to get any work at all and the situation obtained was a precarious one at best. It might or might not have been a "sympathy job."

It could not have affected the views expressed by the court as to the law of the case, either as to the measure of damages or limit of recovery

We believe that the facts of this case take it out of the rule of construction of the Act which the court's opinion announces.

In conclusion, the inconsistency in the judgment in this case is not because the two parts of the Act in question are necessarily inconsistent. The apparent inconsistency only results from the application of the Act to a particular state of facts. It is inevitable that in the application of such an Act such inconsistencies should occasionally develop. This is not sufficient reason for construing the Act otherwise than according to its plain provisions.

We believe that on a re-hearing of this case and the consequent oral argument, the court will reverse its opinion and sustain this judgment;

that if we are wrong in this belief, the court should modify the judgment instead of reversing it.

GEORGE B. GRIGSBY
Attorney for Defendant in Error.

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA,

I, George B. Grigsby, certify that I am the attorney for the petitioner herein, and that in my judgment the petition is well founded, and that it is not interposed for delay.

GEORGE B. GRIGSBY